COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCY
CASE NO. 2015-SC-000408
COURT OF APPEALS CASE NO. 2015-CA-000221-OA

JOHN DOE NO. 1 and
JOHN DOE NO. 2

APPELLANTS

VS:

ON APPEAL FROM PIKE CIRCUIT COURT
HON. EDDY COLEMAN, JUDGE
ACTION NO. 13-CI-1145

HONORABLE EDDY COLEMAN, JUDGE,
PIKE CIRCUIT COURT

APPELLEES

AND

WILLIAM HICKMAN, III

REPLY BRIEF FOR APPELLANTS

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Reply Brief for Appellant was duly mailed, postage prepaid, to: Clerk, Supreme Court of Kentucky, Room 209, State Capitol, 700 Capital Avenue, Frankfort, Kentucky 40601-3488; Clerk

STATEMENT OF POINTS AND AUTHORITIES

FIRST ARGUMENT

THE CONSTITUTIONAL LIMITATION ON DAMAGES APPLICABLE TO CASES IN WHICH STANDARDS ENUNCIATED IN *NEW YORK TIMES CO., V. SULLIVAN*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710, ARE IMPLICATED ARE PART AND PARCEL OF A PRIMA FACIE CASE OF DEFAMATION AND DO NOT ARISE ONLY AFTER THE PLAINTIFF HAS PROVED A CASE OF DEFAMATION.

Simply put, the Court of Appeals sent this case back to the Circuit Court to determine whether a prima facie case had been established. Perfectly analogous to the within situation is *Gilliam v. Pikeville United Mine,* Ky., App., 215 S.W. 3d 56, 60 which says:

> The four elements which must be proven to establish a defamation action in Kentucky include defamatory language, about the Plaintiff, which is published and which causes injury to reputation. [Emphasis added]

In *Gilliam, New York Times Co., v. Sullivan,* Supra was implicated and *Gilliam's* case got dismissed prior to trial because he did not demonstrate prior to trial anything other than presumed damages. As Judge VanMeter wrote as to statements implicated in *New York Times Co., v. Sullivan,* which arose in *Gilliam* in the context of a labor dispute, the Court of Appeals adopted federal case law and wrote:

> Therefore, a plaintiff who endures even malicious libel during a labor dispute must present evidence of harm from defamation in order to recover, notwithstanding the fact

> that damages might otherwise be presumed under state law.

That case relied on *Linn v. United Plant Guard Workers of America Local 114*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed2d 582 (1966) which itself tried to guard against "the threat of state libel suits" dampening the ardor of labor debate and held that where *New York Times Co., v. Sullivan* offers protection, as it certainly does to John Doe No. 1 and John Doe No. 2, that a complainant may not recover except upon proof of specific harm.

Linn spoke of the propensity of juries to award excessive damages for defamation with the resulting threat that libel actions pose a threat to labor unions and smaller employees. The "special scrutiny" which courts across the country are requiring in cases involving anonymous comments on the Internet about matters of public concern and about public figures is designed for the very same sort of protection. The Appellee argues here that the constitutional limitations only come into play in the damages phase of the proceedings, after a Plaintiff has proved his case. It that argument is accepted then persons wanting to exercise freedom of speech and enjoy their First Amendment protections could only do so at their peril. Constitution, as Shakespeare would say, is made of sterner stuff.

If the Appellee were at trial and announced through after the presentation of his case in chief and had not proven actual damage as opposed to presumed damage, the trial court would be

obliged to dismiss his case. No less is required of him at the initial stages. He cannot simply claim damage without proof of the same; neither can he presume it.

SECOND ARGUMENT

THE APPELLEE DID NOT REFUTE THE APPELLANTS' CLAIM THAT THE COURT'S ORDER THAT COUNSEL DISCLOSE THE IDENTITY OF THE APPELLANTS WAS NOT SOUGHT BELOW NOR ARGUED BELOW.

The Appellants asserted in their Brief that there had been no pleading seeking an order that counsel for the Appellants be required to reveal their identity and that that proposition only came about when the Court asked each side to prepare proposed orders, the Appellees prepared one with such language and the Appellants prepared one rejecting such language. The Brief for the Appellees in this case makes no effort to refute that assertion. A question as to whether or not an attorney should be required to reveal the identity of his client when their identity is the essence of the issue in the matter, that is to say when anonymous defendants are seeking to remain anonymous, the Appellants are entitled to have that claim asserted before a Trial Court for proper argument and discussion.

RELIEF SOUGHT

The Appellants, again, seek a Writ of Prohibition against the Trial Court's proceeding without the Appellee's presenting enough facts for the trial court to determine whether there is any

gravitas to its case, sufficient for that case to be maintained in the face of constitutional free speech protections.

Respectfully submitted,

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